

No. 14905

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ALFREDO RAMIREZ GARCIA,

*Appellant,*

*vs.*

HERBERT BROWNELL, Attorney General of the United States, and ALBERT DEL GUERCIO, Officer in Charge Immigration & Naturalization Service at Los Angeles, California,

*Appellees.*

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## BRIEF OF APPELLEES.

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*Appellees.*

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## BRIEF OF APPELLEES.

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### Jurisdiction of the Court.

Appellant brought action in the Court below seeking a judgment declaring him to be a citizen of the United States [R. 3-10].<sup>1</sup> Jurisdiction was invoked pursuant to Section 360(a) of Public Law 414 (Immigration and Nationality Act), Section 2201, Title 28, U. S. C. A., and Article III and the Fourteenth Amendment of the Constitution of the United States [R. 3]. It is the position of appellees that the District Court lacked jurisdiction over the subject matter, that is, the power to determine

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<sup>1</sup>"R" refers to the printed Transcript of Record. "Br." refers to Appellant's Opening Brief.

whether appellant is a citizen of the United States; although it had authority to determine whether such jurisdiction did exist [*Chicot County Dist. v. Bank*, 308 U. S. 371, 376-377 (1940)]. The District Court assumed jurisdiction for the evident purpose of determining whether, from the allegations of appellant's Petition, and from the record as a whole [R. 15], its jurisdiction existed. Having made such determination adversely to appellant, his Petition was dismissed for failure to state a claim upon which relief can be granted [R. 16].<sup>2</sup>

Since the order of the Court below was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to 28 U. S. C., Section 1291. However, the jurisdiction of this Court ends if it finds that the District Court was without jurisdiction of the subject matter [*United States v. Corrick*, 298 U. S. 435, 440 (1936)].

### Statement of the Case.

On May 3, 1955, appellant filed in the court below a Petition for Declaratory Judgment and<sup>1</sup> for Determination of United States Citizenship [R. 3-9]. He claimed jurisdiction under Section 360(a) of Public Law 414 (Immigration and Nationality Act of 1952); Section

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<sup>2</sup>The jurisdictional concept adopted by the court below is indicated by its language in *Aguilera-Flores v. Landon*, 125 Fed. Supp. 55 (S. D. Cal., 1954) at page 57: ". . . Assuming that the defendant is correct in his contention that a deportation order cannot be challenged in the courts except in a habeas corpus proceeding, that determination must be made after and not before the court has assumed jurisdiction over the controversy. If the court determines that deportation orders remain immune to direct attack, then the allegations in the complaint do not state a claim upon which relief can be granted, and the dismissal would be on that ground, not for want of jurisdiction."

2201, Title 28, U. S. C. A.; and Article III and the Fourteenth Amendment to the Constitution of the United States [R. 3].

Appellees moved for dismissal pursuant to Rule 12(b) (1), (2), and (6), Federal Rules of Civil Procedure, for lack of jurisdiction over the subject matter, for lack of jurisdiction over the person, and for failure to state a claim upon which relief can be granted [R. 10-11]. Attached to this motion as exhibits were an affidavit of Albert Del Geurcio, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California [R. 12-14], and a certified record of the Immigration and Naturalization Service relating to appellant [Ex. B].<sup>3</sup> The allegations of appellant's petition and the exhibits attached to appellees' motion disclose that appellant was accorded a hearing in exclusion proceedings by a Board of Special Inquiry at San Ysidro, California, on February 19, 1947; that said Board determined that appellant had expatriated himself as a citizen of the United States under the provisions of Section 401(j) of the Nationality Act of 1940, as amended; and that on February 19, 1947, appellant was excluded from admission to the United States as an alien [R. 6-7, 8, 12-13; Ex. B]. On or about September 21, 1951, appellant managed to reenter the United States and has resided here ever since [R. 7].

Upon the record thus presented, the District Court ordered that appellant's Petition for Declaratory Judgment and for Determination of United States citizenship be dismissed for failure to state a claim upon which relief can be granted [R. 15-16].

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<sup>3</sup>A stipulation was approved by this Court that Exhibit "B" attached to Motion to Dismiss might be considered in its original form [R. 19-20].

### Questions Presented.

1. Did the District Court have jurisdiction to declare appellant a citizen of the United States under the statutory or constitutional provisions invoked in his petition?

2. Did the District Court have jurisdiction to declare appellant a citizen of the United States under Section 503 of the Nationality Act of 1940?

3. Is that portion of Section 360(a) constitutional which precludes an action thereunder where the issue of one's status as a national of the United States (a) arose by reason of or in connection with any exclusion proceedings under the provisions of this or any other Act, or (b) is in issue in any such exclusion proceedings?

### Statutes Involved.

Section 360(a) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., Section 1503(a), provides:

“Sec. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district

court of the United States for the district in which such person resides or claims a residence, and, jurisdiction over such officials in such cases is hereby conferred upon those courts.”

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, provides in pertinent part:

“Sec. 503. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. \* \* \*.”

Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. A., note following Section 1101, provides in pertinent part:

“Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed \* \* \* to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, [*sic*] conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. \* \* \*.”

## ARGUMENT.

### I.

#### Summary.

The District Court was without jurisdiction to declare appellant a citizen of the United States under any of the statutory or constitutional provisions set forth in his petition. Jurisdiction could not be based upon Section 360(a) of the Immigration and Nationality Act of 1952, because the issue of appellant's status as a national of the United States arose by reason of and in connection with exclusion proceedings. Section 2201, 28 U. S. C. A., did not confer jurisdiction, since this statute, commonly referred to as the Federal Declaratory Judgment Act, does not provide an independent basis for federal jurisdiction. Article III and the Fourteenth Amendment of the Constitution do not provide a jurisdictional foundation, because only the Supreme Court derives jurisdiction directly from the Constitution.

Nor did the court below acquire jurisdiction under Section 503 of the Nationality Act of 1940. *Wong Kay Suey v. Brownell*, 227 F. 2d 41 (C. A. Dist., Col., 1955), cert. den. 24 L. W. 3225, which holds that a right to institute an action under Section 503 is preserved by the savings clause of the 1952 Act, is unsound for the following reasons: (1) the savings clause did not preserve mere procedural remedies; (2) the savings clause should not be applied because the 1952 Act specifically provides otherwise; (3) the legislative history of the 1952 Act suggests that Congress intended to cut off the right to institute an action under Section 503.

Section 360(a) does not deny appellant due process. It does not deprive him of his "day in court," but merely relegates him to the judicial remedies, such as habeas

corpus, which existed before the Nationality Act of 1940. The cases upon which appellant relies are distinguishable in that (1) they involved habeas corpus proceedings of which the court unquestionably acquired jurisdiction, and (2) the person claiming citizenship was resisting either deportation or exclusion, which is not true in the case at bar.

## II.

### The District Court Did Not Have Jurisdiction to Declare Appellant a Citizen of the United States Under Any of the Statutory or Constitutional Provisions Invoked in His Petition.

Except for his challenge to the constitutionality of a portion of Section 360(a) of the Immigration and Nationality Act of 1952 (Br. 8-11), Appellant, in his Opening Brief, apparently abandons his claim of jurisdiction under the statutory and constitutional provisions set forth in his petition [R. 3]. The reasons for this implied concession will be briefly discussed.

The District Court did not have jurisdiction under Section 360(a), since the issue of appellant's status as a national of the United States arose by reason of and in connection with exclusion proceedings [R. 12-13; Ex. B; *Nevarez v. Brownell*, 218 F. 2d 575 (C. A. 5, 1955); *Matsuo v. Dulles*, 133 Fed. Supp. 711, 715 (S. D., Calif., 1955); *Beltran v. Brownell*, 121 Fed. Supp. 835 (S. D., Calif., 1954); *Gonzalez-Gomez v. Brownell*, 114 Fed. Supp. 660 (S. D. Calif., 1953); *Vasquez v. Brownell*, 113 Fed. Supp. 722 (W. D., Tex., 1953); *Ng Gwong Dung v. Brownell*, 112 Fed. Supp. 673, 674 (S. D., N. Y., 1953)].

Section 2201, 28 U. S. C. A. did not confer jurisdiction upon the court below. This section, commonly referred to as the Federal Declaratory Judgment Act, does not

provide an independent basis for federal jurisdiction, but merely enlarges the range of remedies available in a federal court, where its jurisdiction is otherwise established. [*Skelly Oil Co. v. Phillips Co.*, 339 U. S. 667, 671 (1950); *Van Buskirk v. Wilkinson*, 216 F. 2d 735, 737 (C. A. 9, 1954); *Southern Pacific Co. v. McAdoo*, 82 F. 2d 121 (C. A. 9, 1956).]

Nor did the District Court acquire jurisdiction under Article III or the Fourteenth Amendment of the Constitution of the United States. Only the Supreme Court of the United States derives jurisdiction directly from the Constitution. Other federal courts have only such jurisdiction as Congress has prescribed [*Lockerty v. Phillips*, 319 U. S. 182, 187 (1943); *Kline v. Burke Construction Co.*, 260 U. S. 226, 233-234 (1922); *People v. Bruce*, 129 F. 2d 421, 423 (C. C. A. 9, 1942), cert. den. 317 U. S. 710].

### III.

#### The District Court Did Not Have Jurisdiction to Declare Appellant a Citizen of the United States Under Section 503 of the Nationality Act of 1940.

For the first time in his Opening Brief, appellant seeks to rely upon Section 503 of the Nationality Act of 1940 as a jurisdictional basis for his petition. He cites in support of his position the recent case of *Wong Kay Suey v. Brownell*, 227 F. 2d 41 (C. A. Dist. Col., 1955), cert. den. 24 L. W. 3225<sup>4</sup>.

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<sup>4</sup>No inference, of course, can be drawn from the denial by the Supreme Court of certiorari (*Brown v. Allen*, 344 U. S. 443, 489-497 (1953)). This is particularly true here because in the District of Columbia, where the *Suey* case arose, it was possible to institute an action for declaration of nationality even before a specific statute was enacted for that purpose (*Perkins v. Elg*, 307 U. S. 325 (1939); *Matsuo v. Dulles*, 133 Fed. Supp. 711, 713 (S. D. Cal., 1955)).

In *Suey* the Court of Appeals for the District of Columbia held that where one claiming citizenship was excluded from admission to the United States prior to the repeal of Section 503 of the Nationality Act of 1940,<sup>5</sup> he acquired a right to have his citizenship judicially determined under the latter statute; and that this right was preserved by the savings clause contained in the Immigration and Nationality Act of 1952,<sup>6</sup> so as to enable him to institute an action under Section 503 for declaration of nationality after the effective date of the 1952 Act. Appellees submit that the *Suey* decision should not be accepted for the reasons which follow.<sup>7</sup>

**(a) Procedural Remedies Were Not Preserved by the Savings Clause.**

Even if it be assumed that by reason of his exclusion during 1947 appellant acquired a "right" to institute an action under Section 503, such right was solely procedural in nature, and as such, was not preserved by the savings

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<sup>5</sup>Section 503 was repealed by Section 403(a) (42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952 (See, Sec. 407 of the Immigration and Nationality Act, 66 Stat. 281).

<sup>6</sup>Section 405(a) of the Immigration and Nationality Act, 66 Stat. 280, 8 U. S. C. A., note following Section 1101.

<sup>7</sup>An acceptance of the *Suey* decision could have far-reaching implications. The State Department has advised that during the five years from 1948 to 1952, 37,518 certificates of loss of nationality were approved pursuant to Section 501 of the Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. A., Section 901. Under the doctrine enunciated in *Suey*, the door is now open to all those citizenship claimants (not resident in this country) who have not previously done so to institute suits for declaratory judgment under former Section 503. In addition, persons abroad claiming nationality as the foreign born children of American parents, who were denied travel documents before December 24, 1952 could institute such actions. While the exact number of the latter type of cases is not known, it is believed to be considerable.

clause of the 1952 Act. Of course, actions actually instituted before December 24, 1952, when Section 503 was repealed, do come within the savings clause.<sup>8</sup> However, since appellant did not file suit before the latter date, the savings clause did not authorize him to do so on May 3, 1955, when the present action was commenced [R. 9]. General phrases contained in the savings clause, such as "right in process of acquisition" and "liability" refer to substantive rights and liabilities, and do not preserve a right to institute an action under Section 503, which was merely a procedural remedy.

The *Suey* decision ignores entirely the distinction between the effect of a general savings clause upon statutes, such as Section 503, which create mere procedural "rights" or remedies, and its effect upon statutes which create substantive rights and liabilities. The latter type of statute is preserved by a general savings clause, while the former is not. [*Bridges v. United States*, 346 U. S. 209, 224-227 (1953); *De La Rama S.S. Co. v. United States*, 344 U. S. 386 (1952); *Hallowell v. Commons*, 239 U. S. 506 (1916); *Aure v. United States*, 225 F. 2d 88, 90 (C. A. 9, 1955); *United States v. Obermeir*, 186 F. 2d 243, 250-256 (C. A. 2, 1952), cert. den. 340 U. S. 951; *Matsuo v. Dulles*, 121 Fed. Supp. 711 (S. D., Calif., 1954).]

In *Aure v. United States*, *supra*, this Court was confronted with the issue of whether a right to naturalization

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<sup>8</sup>For this reason the decisions of this Court in *Fujii v. Dulles*, 224 F. 2d 906, and *Suda v. Dulles*, 224 F. 2d 908, are not in point on the issue here involved. There, the actions had been commenced before the effective date of the 1952 Act, the issue being whether there had been a sufficient denial of a right of citizenship to warrant the institution of such action before December 24, 1952.

existing under the 1940 Act was preserved by the savings clause of the 1952 Act, so as to enable such right to be exercised after the effective date of the latter statute. Following a careful analysis of the recent decision of the Supreme Court in *United States v. Menasche*, 348 U. S. 528 (1955), this Court, speaking through Judge Byrne, observed (p. 90):

“ . . . The real test is whether the ‘right’ which the alien seeks to have preserved by the savings clause is a substantive right, and in this regard we are mindful of the distinction between substantive rights and procedural remedies. . . .” (Emphasis added.)

In *Matsuo v. Dulles*, *supra*, Judge Byrne had occasion to apply this test to the precise question here involved. After an exhaustive review of the authorities, he concluded that Section 503 created merely a procedural remedy which was not preserved by Section 405(a).

To the same effect:

*Ng Gwong Dung v. Brownell*, 112 Fed. Supp. 673, 674 (S. D. N. Y., 1953);

*Avina v. Brownell*, 112 Fed. Supp. 15, 19-20 (S. D. Texas, 1952).

Section 503 should be distinguished from those statutes in which substantive rights are fused with procedural remedies. Thus, in *De La Rama S.S. Co. v. United States*, *supra*, where a war risk policy had been issued under the War Risk Insurance Act of 1940, as amended, which statute authorized suit on the policy in a Federal District Court; the substantive right to recover on the policy and the forum in which suit was to be brought were deemed “fused components of the expression of a policy.” In holding that a general savings clause preserved

a right to maintain suit in the District Court, however, the Supreme Court was careful to recognize the following distinction (p. 390):

“The Government rightly points to the difference between the repeal of *statutes solely jurisdictional in their scope* and the repeal of *statutes which create rights and also prescribe how the rights are to be vindicated*. In the latter statutes, ‘substantive’ and ‘procedural’ are not disparate categories; they are fused components of the expression of a policy. When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. *Ex parte McCardle*, 7 Wall. 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are *Hallowell v. Commons*, 239 U. S. 506, and *Bruner v. United States*, 343 U. S. 112. *If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit.* \* \* \*” (Emphasis added.)

Section 503 of the Nationality Act of 1940 was “solely jurisdictional” in its scope. It did not provide a means of acquiring nationality,<sup>9</sup> but a forum for determining its existence. A judgment under Section 503 does not confer nationality, nor does it take nationality away, but merely adjudicates an already existing status [See, *Acheson v. Fujiko Furusho*, 212 F. 2d 284, 292, 296 (C. A. 9, 1954)]. Appellant lost his nationality, if at all, at the time of his expatriating act [*United States ex rel. Lapidés v. Watkins*, 165 F. 2d 1017 (C. A. 2, 1948)].

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<sup>9</sup>*United States v. Menasche*, 348 U. S. 528 (1955) and *Bertoldi v. McGrath*, 178 F. 2d 977 (C. A. Dist. Col., 1949) afford examples of a general savings clause being applied to preserve a substantive right of citizenship in the process of being acquired under prior law.

(b) The Savings Clause Should Not Be Applied Because the 1952 Act Specifically Provides Otherwise.

Moreover, the savings clause itself provides that it shall apply “unless otherwise specifically provided.” See *Shomberg v. United States*, 348 U. S. 540. Section 360 (a) is a section otherwise specifically providing for retro-active effect; it states that a declaratory judgment action shall not lie if the issue of citizenship” (1) *arose* [in an] exclusion proceeding under the provisions of *this or any other act*, or (2) is in issue *in any such* exclusion proceeding.” (Emphasis added.) The use of the past tense “arose” in a statute which otherwise uses the present tense is itself a strong indication that Congress intended past exclusion proceedings to be governed by the present procedure. And this conclusion is fortified by the phrase “of this or any other act.” The 1952 Act, which is a comprehensive codification of the laws on immigration and nationality, is the statute under which all exclusions after December 24, 1952, would be enforced. “Any other act,” referred to in Section 360(a), must relate to past exclusions under past acts.

The *Suey* decision recognized that the language of Section 360(a) “might perhaps seem to bring the case within the words ‘otherwise specifically provided’ ” to take that section out of the general savings clause (227 F. 2d at p. 43), but thought the language did not have the same degree of specificity as other sections which have been construed to render the savings clause inoperative. In the 1952 Act, however, Congress did not use any one set formula to show that the savings clause was not to apply. The language of Section 241(d), referred to in

*Suey* as a specific section,<sup>10</sup> is quite different from the language of Section 313(a), also thought by the court below to have the degree of specificity rendering the general savings clause inapplicable.<sup>11</sup> For the reasons set forth immediately above, we think that the language of Section 360(a), although employing a different set of words, clearly conveys the idea that the procedure in Section 360(a) is to apply to a past exclusion which "arose" under an act "other" than the 1952 Act, *i. e.*, under prior acts. Particularly is this true since, as we have already pointed out, an uninstituted action would not fall within the normal meaning of the terms used in Section 405(a), and also because a change in remedy is generally construed as being immediately applicable. (See *Ex parte Collett*, 337 U. S. 55, 71; *Bruner v. United States*, 343 U. S. 112, 116-117.)

(c) The Legislative History of the 1952 Act Supports Appellees' Position.

The legislative history of the 1952 Act suggests that Congress intended to cut off the right to bring a declaratory judgment action under former Section 503. One

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<sup>10</sup>Section 241(d), 66 Stat. at 208, 8 U. S. C. 1251(d), held to render the savings clause inapplicable to save a prior status of non-deportability (*Gagliano v. Nabers*, 222 F. 2d 958 (C. A. 5), certiorari denied, 350 U. S. 902; see also *Marcello v. Bond*, 349 U. S. 302), reads in pertinent part that the "provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding \* \* \* that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

<sup>11</sup>That section, 66 Stat. at 240, 8 U. S. C. 1424(a), relating to naturalization, like the section construed in *Shomberg v. United States*, 348 U. S. 540, begins, "Notwithstanding the provisions of Section 405(b)." It does not refer to the general savings clause in Section 405(a).

of the problems which had arisen under Section 503 had been the number of cases where persons had employed this statute solely for the purpose of gaining entry into the United States. In the broad study of the working of the existing immigration and nationality laws represented by Senate Report 1515, 81st Cong., 2d Sess., the following observation is made (p. 777):

“In spite of the definite restrictions on the use and application of section 503 to bona fide cases, the subcommittee finds that the section has been subject to broad interpretation, and that it has been used, in a considerable number of cases, to gain entry into the United States where no such right existed.”

The hearings on the McCarran-Walter bill (which became the 1952 Act) indicate concern with “the fraud and the derivative citizenship cases,” and with the fact that aliens not entitled to admission were gaining physical entry into the United States and disappearing into the general population. Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess. on S. 716, H. R. 2379, and H. R. 2816, p. 443; see also pp. 108-109. The enactment of present Section 360, instead of the alternative suggestion that the pattern of former Section 503 be continued,<sup>12</sup> thus represents a clear Congressional decision to curtail the scope of declaratory judgment review. Since Congress used no words showing a purpose to have the former remedy apply, but, on the contrary, employed phraseology which, as the *Suey* decision itself recognized, can reasonably be read to mean

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<sup>12</sup>The revisions of procedure originated in the Senate bill. The House bill continued the provisions of former Section 503. See S. Rep. 1137, 82nd Cong., 2d Sess., p. 50; H. Rep. 1365, 82nd Cong., 2d Sess., p. 87. The Senate formulation ultimately prevailed.

that the procedure established by the new Section 360(a) should be applicable to all exclusions, past or present, where judicial review had not been sought by December 24, 1952, the holding in *Sney* that the remedy of former Section 503 survives the repeal of that provision is unsound.

#### IV.

### Section 360(a) of the Immigration and Nationality Act of 1952 Is Constitutional.

Appellant urges as unconstitutional that portion of Section 360(a) which precludes an action thereunder "if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding." (Br. 8.) He contends that this provision denies him due process because it leaves "the final determination of a constitutional guarantee of citizenship to a purely ministerial or administrative board or official." (Br. 8.)

Appellant's position is untenable. Section 360(a) does not deprive appellant of citizenship without the sanction afforded by judicial proceedings, but merely relegates him to those judicial remedies, such as habeas corpus, which existed prior to the Nationality Act of 1940. The fallacy of appellant's argument was exposed in *Gonzalez-Gomez v. Brownell*, 114 Fed. Supp. 660 (S. D., Calif., 1953), where Judge Byrne declared (p. 661):

"\* \* \* The statute does not deprive *any* citizen of his day in court. It merely limits relief under this *particular* statute to specified situations, and those who do not fall within the provisions of the

statute are left to the remedies, such as habeas corpus, which existed prior to its enactment.” (Emphasis of the Court.)

Congress, in the Immigration and Nationality Act of 1952 merely set up different procedures for determining the citizenship claim of one who has been excluded from the United States. Sections 360(b) and (c) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 274, 8 U. S. C. A., Sections 1503 (b) and (c), provide for the issuance of a certificate of identity to such person for admission to the United States, a final determination by the Attorney General of his claim to citizenship, and a review of an adverse decision by the Attorney General “in habeas corpus proceedings and not otherwise.”<sup>13</sup> There is no vested right in procedure which makes it constitutionally immune to change by Congress [*Barber v. Yanish*, 196 F. 2d 53, 54, footnote 1 (C. A. 9, 1952), and cases cited therein: *Avina v. Brownell*, 112 Fed. Supp. 15, 19-20 (S. D. Tex., 1953)]. And habeas corpus proceedings are sufficient to meet the demands of due process, for even in these proceedings, appellant, if he meets the necessary criteria, may be entitled to a trial *de novo* on his claim of citizenship [*Ng Fung Ho v. White*, 259 U. S. 276 (1922); *Carmichael v. Delaney*, 170 F. 2d 239 (C. A. 9, 1948)].

The cases relied upon by appellant are distinguishable upon at least two bases. In the first place, each of those proceedings was in habeas corpus, of which the court unquestionably acquired a general jurisdiction. Secondly,

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<sup>13</sup>These administrative remedies must be exhausted before resort may be had to the courts [See, *Garcia v. Del Guercio*, 227 F. 2d 327 (C. A. 9, 1955); *Ramos-Rivera v. Del Guercio*, 227 F. 2d 406 (C. A. 9, 1955)].

in each of the cases, the person claiming citizenship was resisting affirmative governmental action, either deportation or exclusion.

In the instant case, however, appellant is resisting neither deportation nor exclusion. While it is true that appellant was excluded from admission into the United States during 1947, Paragraph XII of his petition makes it clear that, after having been excluded, appellant on or about September 21, 1951, managed to reenter the United States "and ever since said time has lived and resided in the United States and now resides at Gardena, Los Angeles County, California. . . ." [R. 7.] Appellant does not allege that since his 1951 reentry the appellees have instituted deportation proceedings against him or in any other way denied his claimed rights as a national; and the affidavit of Albert Del Guercio shows that no further proceedings have been taken against appellant since that date.<sup>14</sup> If and when deportation proceedings are instituted against appellant, he may then be able to bring himself within the purview of the cases he cites.<sup>15</sup>

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<sup>14</sup>Conceivably, the appellees, mindful of the burden of proof prescribed in cases of this kind by *Gonzales v. Landon*, 350 U. S. 920 (1955), may conclude that appellant was not expatriated, and take no further action against him.

<sup>15</sup>The adjudication of alleged constitutional rights in a declaratory judgment action is not to be encouraged. (*Fletes-Mora v. Brownell*, No. 14,454 (C. A. 9, Dec. 9, 1955—not yet reported) .... F. 2d ....)

### Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the order of the District Court, dismissing appellant's Petition for Declaratory Judgment and for Determination of United States Citizenship, should be affirmed.

Respectfully submitted,

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